Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

CHARLES HERSHFIELD, pro se,

Petitioner,

vs.

BOARD OF ZONING APPEALS OF KING GEORGE COUNTY, VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Virginia

PETITION FOR A WRIT OF CERTIORARI

CHARLES HERSHFIELD, pro se
Box 934
Dahlgren, VA 22448
(540) 663-2903

45pp

QUESTIONS PRESENTED

1. When Petitioner was not notified of the subject matter to be discussed and ruled on in the Board of Zoning Appeals hearing, was his right to Due Process violated?

2. When the Virginia state courts ruled that the paper dated 8 Feb 80 was a zoning permit and not a variance, was Petitioner's right to Due Process violated?

3. When the Virginia state courts did not recognize that the "grandfather" ordinance Section 1-7 applies here, was Petitioner's right to Due Process violated?

4. When the trial court judge never ruled on pleadings presented in writing on 4 Feb 99, was Petitioner's right to Due Process violated?

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PETITION FOR A WRIT OF CERTIORARI

To the Honorable Justices of the U.S. Supreme Court:

Hershfield, the pro se Appellant, is a retired person, 72 years old, and comes to you for Redress of Grievances. And the grievances are obvious and blatant violations of the right to Due Process of Law as guaranteed by the U.S. Constitution. This right was violated by the state courts of Virginia, and the matter comes to you as the court of last resort.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia was entered on 10 Sep 99. The denial of the petition for rehearing was entered on 5 Nov 99.

JURISDICTION

The jurisdiction of this Court is sought under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause of the Fifth Amendment of the United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Due Process Clause of the Fourteenth Amendment of the United States Constitution:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

This is a zoning matter in which the County wants to enforce a corner visibility zoning ordinance, while Petitioner contends that he received a valid variance about 20 years ago. Petitioner appealed to the BZA, providing the BZA with a copy of his variance, before the BZA hearing was scheduled to be held. He then went to circuit court, and then to the Virginia supreme court. He argues that his 8 Feb 80 paper is a valid variance and will present that argument and others. The amount of money involved here is a maximum three thousand dollar fine.

REASONS WHY CERTIORARI SHOULD BE GRANTED

There were 13 points raised in the Petition for Appeal, where each point was argued for either a reversal or a remand.

In this Petition for a Writ of Certiorari, for clarity only 4 of those points will be considered, with no waiver given with regard to arguments on the other points.

The 4 points to be considered here are the numbers 7, 8-9 taken together, 10, and 11, as numbered in the Petition for Appeal.

A well established principle applicable here is that a "decision of a board of zoning appeals is presumed to be correct on appeal to a circuit court; the appealing party bears the burden of showing that the board applied erroneous principles of law or that its decision was plainly wrong and in violation of the purpose and intent of the zoning ordinance." *Masterson v. Board of Zoning Appeals*, 233 Va. 37, 44, 353 S.E.2d 727, 732-733 (1987).

Hershfield shows in his Petition for Appeal that the BZA applied erroneous principles of law in numbers 7, 8-9, and 10, and that therefore the trial court erred when it did not reverse the decision of the BZA.

Please refer to the Petition for Appeal for detailed presentations of the arguments in 7, 8-9, 10 and 11 and if any one of those arguments shows that the BZA applied an erroneous principle of law, then the decision of the BZA is reversible.

In the Petition for Appeal, argument 7 is on page 21, 8-9 taken together is on pages 22-24, 10 is on page 25 and 11 is on page 26.

1. ***Argument 7* (Improper Notice)**

Hershfield was charged with only the obstruction of visibility. He was notified of a hearing for the purpose of determining whether or not there was indeed obstruction of visibility. But the record shows, in the letter dated 23

Apr 98, on page 14 of the Petition, that the BZA considered whether the paper of 8 Feb 80 was a variance, without notice to Hershfield that there would be such a determination to be made by the BZA, and so Hershfield was given no opportunity to appear prepared to respond on that point. The law requires notice as to what issues will be argued, so that the parties may prepare their arguments for the hearing. This was an application by the BZA of an erroneous principle of law, and so is reversible error.

2. *Argument 8-9* (Variance or Zoning Permit?)

Because they are closely related, numbers 8 and 9 are combined into one argument. Clearly, even though referenced as a zoning permit, the paper of 8 Feb 80, page 9 of the Petition, is in fact a variance. The arguments given in 8 and in 9 strongly show this, especially the words of Justice Snead shown on pages 16 and 17 of the Petition. In the *Semple* case, Justice Snead refers to a paper as a variance, in spite of the fact that it is mistakenly called something else by the BZA of Roanoke, as shown at the bottom of page 16 of the Petition. Using the definition of variance, the paper of 8 Feb 80 is indeed a variance, and by calling the paper a zoning permit instead of a variance, the King George BZA applied an erroneous principle of law, and therefore the BZA decision is reversible error.

3. ***Argument 10*** **(Grandfathering of Prior Rights)**

This is a "grandfathering" argument, and page 25 of the Petition is clear in showing that the grandfather ordinance Section 1-7 does apply here, and by not recognizing Hershfield's prior rights, the BZA applied an erroneous principle of law. Therefore, the BZA decision is reversible error.

4. ***Argument 11*** **(Trial Court Did Not Respond to Written Pleadings)**

Judge did not respond to 4 Feb 99 pleadings, a denial of Due Process rights.

CONCLUSION

To the Honorable Justices of the U.S. Supreme Court:

The BZA gave improper notice for their hearing, mistakenly called a variance a zoning permit, and did not recognize prior rights, all of which are applications of erroneous principles of law. From the *Masterson* case, if it can be shown that the BZA applied erroneous principles of law in making its decision, then there is reversible error, and the circuit court erred in not reversing the BZA decision. Further, the circuit court judge erred in not ruling on the pleadings filed on 4 Feb 99, denying Petitioner his Due Process right. Based upon these arguments, the Appellant asks that the ruling of the trial court be reversed, or in the alternative, that the ruling of the Virginia Supreme Court be reversed, or in

the alternative, that this matter be remanded for further consideration.

Respectfully submitted,

Charles Hershfield
Box 934
Dahlgren, VA 22448

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 10th *day of* September, 1999.

Charles Hershfield, Appellant,

against Record No. 991189
Circuit Court No. CH98-37

Board of Zoning Appeals of
King George County, Appellee.

From the Circuit Court of King George County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ Jennifer G. Earl
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 5th *day of* November, 1999.

Charles Hershfield, Appellant,

against Record No. 991189
Circuit Court No. CH98-37

Board of Zoning Appeals of
King George County, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 10th day of September, 1999 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ David B. Beach
Clerk

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA

Charles Hershfield, pro se — Appellant

against — Record No. 0964-99-2
Circuit Court No. CH98-37

Board of Zoning Appeals of King George County — Appellee

Petition for Appeal

Charles Hershfield, pro se
Box 934
Dahlgren, VA 22448

Certified Mail No.
Z 505 075 451

Assignments of Error

(Matching numbers in this Petition are matching in subject matter for the 3 categories Assignments of Error, Questions Presented, and Facts and Arguments.)

1. The trial court erred by changing the set trial date. When Hershfield appeared for trial on the previously set date of 29 Oct 98, a new trial date was selected, without consulting with Hershfield. This was abuse of discretion because selection of a new trial date gave the County time to correct their error in not making a timely response to the writ of certiorari. Hershfield deserves the right to a fair and impartial hearing. Such a change in trial date violated Hershfield's right to due process of law.

2. The trial court erred by denial of Hershfield's motion for a temporary Stay of any action by the County retroactive to 11 Nov 97. The denial was a violation of the right to due process of law.

3. The trial court erred in not dismissing charges when Hershfield showed evidence that his FOIA request for his variance failed.

4. The trial court erred in not dismissing charges when Hershfield argued that the County, by its lack of action for 18 years, recognized de facto that there was no violation of the zoning law.

5. The trial court erred in not dismissing charges when Hershfield pointed out that the zoning code section numbers and written matter were different in the past compared with the present, which was use of an erroneous principle of law by the BZA.

6. The trial court erred by not ruling that the inclusion of an irrelevant petition was plainly wrong and an erroneous principle of law used by the BZA in reaching their decision.

7. The trial court erred by ruling that Hershfield was given notice of charges other than that of obstruction of visibility. Because the BZA reached their decision using an erroneous principle of law, the charge should have been dismissed.

8. The trial court erred when it ruled that the paper dated 8 Feb 80 is a zoning permit, in spite of the fact that Hershfield showed that by legal definition it is indeed a variance. The BZA was plainly wrong and applied an erroneous principle of law, and therefore the trial court should have vacated its ruling and dismissed the charge.

9. The trial court erred when it ruled that a variance does not give permission to violate a zoning law. And when the BZA acted under that erroneous principle of

law they were plainly wrong, and the trial court should have dismissed charges.

10. The trial court erred in not recognizing that the County Code grandfather section protects Hershfield from any action in this matter, and so the trial court should have dismissed the charge.

11. The trial court erred in not ruling on the 23 pages of pleadings filed 4 Feb 99, and that error violated Hershfield's Constitutional rights to due process of law and redress of grievances. Those pleadings included motions to dismiss charges and vacate the ruling against Hershfield. He moves that the trial court ruling be vacated.

12. The trial court erred by ruling that the motion to restrict the jurisdiction of the reviewing court has no merit. The consideration of any arguments not having to do with the correctness of the BZA decision is a violation of Hershfield's right to due process of law.

13. The trial court erred by not granting a Stay of any action so that these matters could be dealt with in trial court. Hershfield brought up the matter of a hearing by stating "If there is a need for oral argument, I am prepared to appear promptly at the convenience of the court.

Questions Presented

1. Did the trial court err by abusing its discretion when it arbitrarily changed the trial date after Hershfield appeared and the trial began as scheduled, and after the County failed to make a timely response to the writ of certiorari?

2. Did the trial court err by the denial of Hershfield's motion for a temporary stay of any action by the County retroactive to the beginning of that action?

3. Did the trial court err when it did not dismiss charges after Hershfield showed evidence that there was a violation of the FOIA?

4. Did the trial court err when it failed to dismiss charges when Hershfield argued that the County, by its lack of action for 18 years, recognized de facto that there was no violation of zoning law?

5. Did the trial court err when it did not dismiss charges when Hershfield pointed out that the zoning code number under which the charge was brought is different from the one used to grant Hershfield's variance, which erroneous principle of law was used by the BZA to rule against Hershfield?

6. Did the trial court err by not ruling that the inclusion of an irrelevant petition was plainly wrong and an erroneous principle of law used by the BZA?

7. Did the trial court err by ruling that Hershfield was given proper notice of other charges in addition to that of obstruction of visibility?

8. Did the trial court err when it ruled that the paper dated 8 Feb 80 is a zoning permit after Hershfield presented strong evidence that it is a variance?

9. Did the trial court err when it ruled that a variance does not give permission to violate a zoning law?

10. Did the trial court err when it did not recognize that the County Code grandfather section protects Hershfield from this action?

11. Did the trial court err in not ruling on the 23 pages of pleadings filed on 4 Feb 99?

12. Did the trial court err when it ruled that the motion to restrict the jurisdiction of the reviewing court has no merit?

13. Did the trial court err by not granting a Stay of any action in this case so that all of these pre-trial motions could be ruled on?

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King George County, Virginia

[Name And Address Omitted In Printing]

Charles Hershfield
P.O. Box 934
Dahlgren, VA 22448

In Re: Charles Hershfield vs.
Board of Zoning Appeals
Case No. CH98-37 (Petition)

Dear Mr. Hershfield:

You are hereby notified that the above mentioned case was entered in the Circuit Court Term Day of July 9, 1998 for the setting of a trial date.

Be advised that the trial date has been set for October 29, 1998 at 10:00 o'clock a.m.

Sincerely,

/s/ Charles V. Mason
Charles V. Mason, Clerk

CVM/plj
c.c. Jean M. Kelly, Attorney

Date: 8 FEB 80

Approved GLW
2-8-8

Application is hereby made for a zoning permit in accordance with the description and for purpose hereinafter set forth. Submitted with this application are two (2) copies of a scale drawing showing the size and shape of the parcel of land on which the proposed building is to be

constructed, the nature of the proposed use of the building or land, and the location such building or use with respect to the property lines of said parcel of land or highway adjoining said parcel of land. This application is made subject to all applicable County State laws, which are hereby agreed to by the undersigned and which shall be deemed a condition entering into the exercise of this permit.

Owner CHARLES J. HERSHFIELD, JR

Address Box 766, Dahlgren
15TH AND PAYNE DAHLGREN

Builder _____

Address _____

Zoning District DR-1

Parcel No. Shown on Zoning Map 18A1(1) 89

If for alterations or repairs, state nature: CHAIN LINK FENCE MORE THAN

Building Use: THREE FEET HIGH LESS THAN 20 FEET FROM INTERSECTION

If for non-conforming use, state nature: _____

Is an old building to be removed or demolished?

Yes _____ No _____.

Sewage Disposal: Septic System _____ Public System _____ Water Supply: Well _____ Public System _____ Location: NESW _____ Side of Route No. _____ miles from _____ Or: _____ Side of _____ Street, between _____ and _____ Lot No. _____ Block _____ Section _____ of _____ Subdivision No. of Acres in Tract _____

size of lot 110 x 200.

A building permit must be received from the Building Official prior to starting construction. Before the Building Official can issue a Building Permit the applicant must submit a copy of the Sewer and Water Service form, stamped paid as approved by the Sanitary District Agent a permit to install a septic system and well issued by the County Health Department which is applicable.

I hereby certify that I have the authority to make the foregoing application, that the information given is correct and that the construction or use will conform with all County State Laws.

/s/ Charles J. Hershfield, Jr.
Signature of Owner or
Authorized Agent

Box 766 Dahlgren 703-663-8
Address and Telephone Number

Property is recorded in
Deed Book _____, Page _____.

King George County, Virginia

[Address And Name Omitted In Printing]

Mr. Charles Hershfield
P.O. Box 934
Dahlgren, VA 22448

March 12, 1998

RE: Freedom of Information Act Request
Tax Map 18A1(1), Parcel 89

Dear Mr. Hershfield:

The Department of Community Development is responsible for conducting all activities, including record keeping, relating to the administration of the King George County Zoning Ordinance. The Department Staff has conducted a complete search of all records maintained by this office pertaining to the above referenced parcel. This search did not locate any record of a variance being issued for Tax Map 18A1(1), Parcel 89 to Section 3.9.2, King George County Zoning Ordinance.

If you have any further questions, please contact me.

Respectfully,

/s/ Jack Green
Jack Green, AICP
Land Use Administrator

cc: Gail P. Clayton, County Administrator
Chron. File
Parcel File

21 Mar 98 Saturday

Jack Green, AICP
Land Use Administrator

Certified Mail No.
Z 206 575 006

Dear Mr. Green:

Reference the alleged zoning violation, Visibility Clearance.

As I stated on my appeal form, I already had been granted a variance, and after a very lengthy search, during which I nearly turned my house upside down, I located my variance permit, copy attached. As the permit shows, it was approved on 8 Feb 80. I requested a variance to the intersection visibility ordinance, and the application procedure was followed exactly according to the County requirements at that time. Approval was granted for having objects "more than three feet high less than 20 feet from intersection."

Your letter of 11 Nov 97 notifies me of an alleged violation for obstruction of visibility. My variance permit clearly authorizes such an obstruction, and after receiving the variance permit on 8 Feb 80, there have always been some objects over three feet high and less than 20 feet from the intersection.

I do wish to emphasize the fact that, from time to time, I make sure that there is reasonable visibility at the intersection, in spite of the fact that I was granted a variance.

I trust that this letter will resolve this matter to your satisfaction.

Sincerely,

/s/ Charles Hershfield
Charles Hershfield
Box 934
Dahlgren, VA 22448

King George County, Virginia

[Address And Name Omitted In Printing]

August 23, 1985

REGISTERED MAIL
RETURN RECEIPT
REQUESTED

Mr. Charles J. Hershfield, Jr.
Box 766
Dahlgren, Virginia 22448

Dear Mr. Hershfield:

A recent visit to the Dahlgren area revealed that the plant growth on your property, Parcel 89, Tax Map 18A1(1), located at the intersection of 15th Street and Payne Drive is in violation of the King George County Zoning Ordinance. Article 3, Section 3.4.9 of the ordinance states:

> "*Visual Obstruction*
>
> In the case of corner lots, there shall be no planting, fence or obstruction to vision more than three (3) feet high, less than twenty (20) feet from the intersection of two (2) streets right-of-way."

The purpose of this letter is to inform you that corrective action to correct the above violations must be taken immediately. Failure to comply with the above by September 6, 1985, will result in the matter being referred to the Commonwealth's Attorneys' office for legal action.

If you have any questions regarding this matter, please contact my office.

Sincerely,

/s/ G. L. Wallace
G. L. Wallace
Zoning Administrator

GLW/ef
CC: Commonwealth's Attorney

King George County, Virginia

[Address And Name Omitted In Printing]

March 13, 1998

Charles Hershfield, Jr.
P.O. Box 934
Dahlgren, VA 22448

RE: Case Number 98-02-A01

Dear Mr. Hershfield:

The King George County Board of Zoning Appeals will hold a public hearing beginning at 7:00 p.m. on Tuesday, March 24, 1998 in the Board Room of the Revercomb administration Building to consider your request to

appeal the zoning administrator's determination regarding Visibility Clearance at Intersection, King George County Zoning Ordinance, Section 3.9.2 at your property located at 17000 15th Street.

It is suggested that you or your representative be present at the above specified public hearing to answer any questions the Board may have of you. A staff report which will be presented at the meeting is attached for your information.

Sincerely,

/s/ Jack Green/KM
Jack Green, AICP
Land Use Administrator

cc: Case File

King George County, Virginia

[Address And Name Omitted In Printing]

Certified Mail

Apri 23, 1998

Mr. Charles J. Hershfield, Jr.
P.O. Box 934
Dahlgren, VA 22448

RE: Zoning Violation Tax Map 18A1(1),
Parcel 89
17000 15th Street
Violation of Section 3.9.2,
Visibility Clearance at Intersection

Dear Mr. Hershfield:

At its March 24, 1998 meeting, the King George County Board of Zoning Appeals voted to uphold the Zoning Administrators determination that the above referenced property is in violation of Section 3.9.2, Visibility Clearance at Intersection. As previously stated to you, King George County does not have a record of a variance ever being issued to Section 3.9.2 for Tax Map 18A1(1), Parcel 89. In hearing this case, the Board of Zoning Appeals did review the *Zoning Permit* for a chain link fence that you provided by Certified Mail (copy attached). However, the Board found that the Zoning Permit for the fence did not reference or constitute a variance. In addition, the Board found that the individual who initialed the Zoning Permit in 1980, Mr. George L. Wallace (GLW), cited the property in 1985 for a violation of Section 3.9.2, Zoning Ordinance.

On April 11, 1998, you signed for a letter, sent by Certified Mail on March 25, 1998, that informed you of the

action of the Board of Zoning Appeals. In the letter you were provided an additional 10 days to comply with the Ordinance. A site inspection on April 23, 1998, indicated that visibility at the intersection continues to be obstructed and therefore, per Article 6, King George County Zoning Ordinance you are being assessed a fine $50.00 as the first violation.

If you have any questions, please contact me.

Respectfully,

/s/ Jack Green
Jack Green, AICP
Land Use Administrator

cc: Charles A. Sakowicz,
Director of Community Development
Parcel File
Chron. File

WORDS AND PHRASES

77, 126 S.E. 405 (1925). See Attachment and Garnishment, § 38. See also Criminal Procedure, § 63; Indictments, Informations and Presentments, § 57.

A variance permits the use of property in a manner forbidden by the zoning law in order to alleviate conditions peculiar to the particular property. C. & C. Inc. v. Semple, 207 Va. 438, 150 S.E.2d 536 (1966). See Zoning and Planning, § 6.

A conditional use is not synonymous with a variance, it is another less frequently used term for a special exception. A special exception or conditional use, unlike a

variance, does not involve the varying of an ordinance, but rather compliance with it. When it is granted, a special exception or conditional use permits certain uses which the ordinance authorizes under stated conditions. Harding v. Board of Zoning Appeals, 219 S.E.2d 324 (W. Va. 1975).

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207 Va. 438

C. & C. INCORPORATED

v.

Susan Lyne SEMPLE et al.

Supreme Court of Appeals of Virginia.

Oct. 10, 1966.

SNEAD, Justice.

C. & C. Incorporated, hereinafter referred to as C. & C., appealed from an order entered February 18, 1965, wherein the decision of the Board of Zoning Appeals of the City of Roanoke granting C. & C. "a non-conforming permit" (actually a variance and it will be hereinafter referred to as such[1]) to use certain property owned by it

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[1] "A non-conforming use is a lawful use existing on the effective date of the zoning restriction and continuing since that time in non-conformance to the ordinance." 2 Yokley, Zoning Law and Practice, § 16-2 (3d ed.) at p. 212. A variance permits the use of property in a manner forbidden by the zoning law in order to alleviate conditions peculiar to the particular property. 101 C.J.S. Zoning § 273, pp. 1037, 1039.

as a parking lot for its customers and employees was reversed.

* * *

Nature of the Case

This is a zoning matter in which the County wants to enforce a corner visibility zoning ordinance, while Hershfield contends that he received a valid variance about 19 years ago. Hershfield appealed to the BZA, providing the BZA with a copy of his variance. He then went to circuit court, and he now appeals to the Virginia Supreme Court. He argues that his 8 Feb 80 paper is a valid variance and will present that argument and others to the Supreme Court.

Facts and Argument Relating to Each Assignment of Error

1. Hershfield was officially notified that "the trial date has been set for October 29, 1998 at 10:00 o'clock a.m." See letter from Circuit Court Clerk on Page 8. Hershfield appeared as notified, ready for trial, but the trial court, on page 3, line 9 of the 29 Oct 98 transcript, gave the County 10 days to add to the record, after the trial had already begun. On 6 Nov 98 the Response to Writ of Certiorari was filed. If the trial had proceeded as scheduled on 29 Oct 98, the charge against Hershfield would have been dismissed, because the County had no Response to Writ of Certiorari prepared in time. Hershfield is entitled to a fair and impartial hearing. By postponing further proceedings in the trial, the trial court

manifestly abused its discretion by postponing this case, resulting in the giving to the County time to meet the time requirements which it did not meet for the officially set trial. See Bloodworth v. Caldwell, page 7. Hershfield asks that the decision of the trial court be vacated, and that the charge be dismissed.

2. Hershfield moved for a temporary Stay of action by the County. For 18 years there was exercise of the variance granted by the County on 8 Feb 80. It is unreasonable, arbitrary, and capricious for the trial court to deny such a motion after exercise of the variance for such a long period as 18 years, even if the County challenges the variance. Because of this denial of his right to due process of law, Hershfield asks for a remand for further proceedings.

3. Hershfield made an official request for a copy of his variance under the Freedom of Information Act. The County stated that they had no such paper in their letter dated 12 Mar 98, copy on page 10. Hershfield finally located his copy of the variance. See page 11. A copy was received by the County prior to the meeting of the BZA which considered this matter. Hershfield had no time to prepare for a BZA hearing based upon the recently located variance. He decided not to appear because he indeed possessed a variance, and so he sent a copy for the BZA to see before the scheduled hearing. Please see the letter on page 11. Because the County did not supply a copy of the 8 Feb 80 variance when requested to do so in March of 1998, Hershfield could not properly prepare for a hearing before the BZA, a violation of his right to due

process of law. Therefore, Hershfield moves that the decision of the trial court be vacated, and that the charge be dismissed.

4. The County did not take any action in this matter for about 18 years. The variance paper is dated 8 Feb 80, page 9. Because the County took no action against Hershfield for 18 years, the County recognized de facto that there was no violation of zoning law. Bringing charges after 18 years is unreasonable, arbitrary, and capricious, and so is a violation of Hershfield's right to due process of law. Hershfield moves that the ruling of the trial court be vacated, and that the charge be dismissed.

5. In the County Code section at issue, the old section number and written material under which the variance was granted to Hershfield is different from the current section number and written material. The variance was granted under the old number 3.4.9, and the current number is 3.9.2. See page 12 for a copy of the old ordinance. The County never gave any evidence showing sufficient relation, if any, between the two. Therefore, because the County never showed the necessary relation between the two differently numbered sections of the zoning code, the procedure used by the BZA was plainly wrong, and is erroneous law, and Hershfield moves that the trial court ruling be vacated and that the charge be dismissed.

6. An irrelevant petition was used by the BZA to reach its decision. Because the BZA was plainly wrong and used an erroneous principle of law in using irrelevant evidence and bringing no witnesses to give testimony, the

ruling of the trial court should be vacated, and the charge should be dismissed.

7. Hershfield was charged with only one violation, and that was obstruction of visibility. See page 13, with the letter dated 13 Mar 98. Hershfield was led to believe that the only issue before the BZA was whether there was a blockage of visibility. The BZA discussed other matters, matters for which no notice was given to Hershfield, such as the matter as to whether the paper dated 8 Feb 80, page 9, is or is not a variance. See page 14, letter dated 23 Apr 98. So that preparation could be made to present his case before the BZA, Hershfield was entitled to have notice of each issue to be argued before the BZA. The BZA was plainly wrong to base their decision on a discussion of issues for which no previous notice was given. Hershfield moves that the ruling of the trial court be vacated, and that the charge be dismissed, based upon violation of his right to due process of law.

8. The BZA ruled that the paper dated 8 Feb 80, page 9, was a zoning permit, and not a variance. See page 14, letter dated 23 Apr 98. In Section 1.9 of the County zoning ordinance, zoning permit is defined as a permit issued which certifies that a property use is in compliance with the regulations. The paper dated 8 Feb 80, page 9, gives approval to violate the visibility ordinance by having an object more than 3 feet high near the corner, which is just the opposite of a zoning permit. Also, see page 11, the letter dated 21 Mar 98. The BZA was plainly wrong and applied an erroneous principle of law. Hershfield moves that the ruling of the trial court be vacated, and that the charge be dismissed.

9. The BZA applied an erroneous principle of law when they proceeded (page 9) on the assumption that the paper dated 8 Feb 80 was not a variance, even after Hershfield informed Mr. Green previous to the 24 Mar 98 (page 9) meeting of the BZA that the paper of 8 Feb 80 was in fact a variance. (page 14) In Mr. Green's letter dated 23 Apr 98, the words Zoning Permit are underlined, showing that the BZA continued to make that gross error. And in that same letter, Mr. Green states that "the Zoning Permit for the fence did not reference nor constitute a variance," which was (page 15) another gross error made by the BZA. In Michie's Words and Phrases, the definition says that a variance permits use of a property in a manner forbidden by the zoning law, which is exactly what the paper (page 9) dated 8 Feb 80 does. It permits Hershfield to violate the zoning law by obstructing visibility in such a manner as the law forbids, with "a planting, fence or obstruction to vision more than three (3) feet high, less than twenty (20) feet from the intersection of two (2) streets right of way." The preceding quotation is from the County (page 12) Zoning Ordinance Article 3, Section 3.4.9, in effect on 8 Feb 80. And the definition makes it clear that an obstruction is an obstruction, no matter what is doing the obstructing. Whether it is a planting, fence, or other obstruction to vision as written in Section (page 12) 3.4.9 is not relevant. The variance gives permission to obstruct visibility, which alleviates conditions peculiar to a corner lot. Hershfield was, granted the right to violate the zoning ordinance, whether by a planting, fence, or other obstruction to vision. That is the meaning of a variance according to the definition, and in this case it applies to only one thing: Visual Obstruction, as the (page

12) Ordinance 3.4.9 is titled. (pages 16 and 17) Next, consider C. & C. Inc. v. Semple, 150 S.E.2d 536 (1966). Justice Snead is very clear in stating that after finding a permit improperly titled, he called it a variance, because it satisfied the definition of variance. Please see pages 536 and 537 of the Semple case where Justice Snead says "actually a variance and it will be hereinafter referred to as such." And the footnote says "A variance permits the use of property in a manner forbidden by the zoning law in order to alleviate conditions peculiar to the particular property." And that is exactly what the variance dated (page 9) 8 Feb 80 does. It alleviates conditions peculiar to a corner lot. The paper dated 8 Feb 80 is clearly a variance, and the BZA committed a gross error by refusing to admit that it is a variance, especially after having in their hands Hershfield's letter dated (page 11) 21 Mar 98, with the copy of the variance included with the letter. The BZA is plainly wrong and because of their application of an erroneous principle of law, the ruling against Hershfield should be vacated, and the charge should be dismissed.

10. (page 9) (page 12) The variance is dated 8 Feb 80. The County letter dated 23 Aug 85 shows that the ordinance Section 3.4.9 was in effect on 8 Feb 80, and it was called Visual Obstruction. Hershfield was given approval to obstruct vision at the corner, under authority of the Zoning Administrator. Now, notice that Section 1-7 of the County Code says that "Nothing in this Code or the ordinance adopting this Code shall affect any . . . right established . . . on or before the effective date of this Code." Then notice that Section 1.4 states that the effective date is 3 Sep 87, showing that rights conferred by the variance dated 8 Feb 80 are not affected by the current

Code. The BZA applied erroneous principles of law in denying Hershfield's appeal. They made a gross error in taking away prior rights, rights granted prior to 1987. The decision of the BZA is plainly wrong, and the ruling against Hershfield should be vacated, and the charge should be dismissed.

11. On 4 Feb 99 there were several motions filed including motions to vacate the trial court ruling and to dismiss charges against Hershfield. The trial court did not respond to those pleadings, which is a violation of Hershfield's Constitutional rights to due process of law and redress of grievances. Because of this violation of his rights, he moves that the trial court ruling be vacated and that the charge be dismissed, or in the alternative, that this matter be remanded for further proceedings.

12. On 19 Mar 99 a motion was filed to restrict the jurisdiction of the trial court in this matter. The trial court denied the motion, in spite of the citation of Foster v. Geller, which was a ruling that the jurisdiction is indeed restricted. Justice Lacy stated in part: "The reviewing court may only consider the correctness of the BZA's decision . . . " The quote is from page 805. Because the trial court denied that motion to restrict jurisdiction, Hershfield moves that the ruling of the trial court be vacated, and that the charge be dismissed.

13. On 19 Mar 99 Hershfield filed another motion for a Stay so that all of the post-trial motions could be ruled on by the trial court, with oral argument if needed to clarify any issues. By "these motions" Hershfield meant all of the post-trial motions presented in this zoning case. The same Stay request was included on the last page of the

motions filed on 4 Feb 99, but with no response received, Hershfield repeated his motion for a Stay on 19 Mar 99. Hershfield brought up the matter of a hearing by stating: "If there is a need for oral argument, I am prepared to appear promptly at the convenience of the court." The trial court denied this motion for a Stay, and by that denial violated Hershfield's right to due process of law. Hershfield moves that this matter be remanded for further proceedings.

Conclusion

The "trial court review is limited to determining whether the decision of the board of zoning appeals is plainly wrong or is based upon erroneous principles of law." That quote is from Board of Zoning Appeals of James City County v. University Square Associates, page 388. In that case they cite Masterson v. Board of Zoning Appeals. There are numerous instances given in this Petition in which the BZA was plainly wrong or where their decision was based upon erroneous principles of law. Hershfield moves that the ruling of the trial court be vacated, and that the charge. be dismissed, or in the alternative, that this case be remanded for further proceedings.

Respectfully submitted,

/s/ Charles Hershfield
Charles Hershfield, pro se
Box 934
Dahlgren, VA 22448

Oral argument is not waived.

Also, Hershfield moves that the photographs marked as refused by the trial court be accepted as part of the Record for this case.

CERTIFICATE:
I hereby certify that a copy of this Petition has been sent by first class mail postage prepaid to Jean Masten Kelly, County Attorney, Post Office Box 509, Bowling Green, VA 22427, on this day 4 Jun 99.

IN THE SUPREME COURT OF
VIRGINIA AT RICHMOND

Charles Hershfield, pro se — Appellant

V. — Record No. 991189
Circuit Court No. CH98-37

Board of Zoning Appeals of
King George County — Appellee

PETITION FOR REHEARING

Charles Hershfield
Box 934
Dahlgren, VA 22448

Certified Mail No.
Z 411 581 871

Charles Hershfield, pro se, hereby petitions this court for a Rehearing of his Petition for Appeal.

There were 13 points raised in the Petition for Appeal, where each point was argued for either a reversal or a remand.

In this Petition for Rehearing, for clarity only 4 of those points will be considered, with no waiver given with regard to arguments on the other points.

The 4 points to be considered here are the numbers 7, 8-9 taken together, and 10, as numbered in the Petition for Appeal.

A well established principle applicable here is that a "decision of a board of zoning appeals is presumed to be correct on appeal to a circuit court; the appealing party bears the burden of showing that the board applied erroneous principles of law or that its decision was plainly

wrong and in violation of the purpose and intent of the zoning ordinance." *Masterson v. Board of Zoning Appeals*, 233 Va. 37,44,353 S.E.2d 727, 732-733 (1987).

Hershfield shows in his Petition for Appeal that the BZA applied erroneous principles of law in numbers 7, 8-9, and 10, and that therefore the trial court erred when it did not reverse the decision of the BZA.

Please refer to the Petition for Appeal for detailed presentations of the arguments in 7, 8-9, and 10, and if any one of those arguments shows that the BZA applied an erroneous principle of law, then the decision of the BZA is reversible.

In the Petition for Appeal, argument 7 is on page 21, 8-9 taken together is on pages 22-24, and 10 is on page 25.

Argument 7 (Improper Notice)

Hershfield was charged with only the obstruction of visibility. He was notified of a hearing for the purpose of determining whether or not there was indeed obstruction of visibility. But the record shows, in the letter dated 23 Apr 98, on page 14 of the Petition, that the BZA considered whether the paper of 8 Feb 80 was a variance, without notice to Hershfield that there would be such a determination to be made by the BZA, and so Hershfield was given no opportunity to appear prepared to respond on that point. The law requires notice as to what issues will be argued, so that the parties may prepare their arguments for the hearing. This was an application by the BZA of an erroneous principle of law, and so is reversible error.

Argument 8-9 (Variance or Zoning Permit?)

Because they are closely related, numbers 8 and 9 are combined into one argument. Clearly, even though referenced as a zoning permit, the paper of 8 Feb 80, page 9 of the Petition, is in fact a variance. The arguments given in 8 and in 9 strongly show this, especially the words of Justice Snead shown on pages 16 and 17 of the Petition. In the Semple case, Justice Snead refers to a paper as a variance, in spite of the fact that it is mistakenly called something else by the BZA of Roanoke, as shown at the bottom of page 16 of the Petition. Using the definition of variance, the paper of 8 Feb 80 is indeed a variance, and by calling the paper a zoning permit instead of a variance, the King George BZA applied an erroneous principle of law, and therefore the BZA decision is reversible error.

Argument 10 (Grandfathering of Prior Rights)

This is a "grandfathering" argument, and page 25 of the Petition is clear in showing that the grandfather ordinance Section 1-7 does apply here, and by not recognizing Hershfield's prior rights, the BZA applied an erroneous principle of law. Therefore, the BZA decision is reversible error.

Conclusion

To the Honorable Justices of the Supreme Court of Virginia: The BZA gave improper notice for their hearing, mistakenly called a variance a zoning permit, and did not recognize prior rights, all of which are applications of erroneous principles of law. From the *Masterson* case, if it can be shown that the BZA applied erroneous principles

of law in making its decision, then there is reversible error, and the circuit court erred in not reversing the BZA decision. Based upon these arguments, Hershfield requests a Rehearing of his Petition for Appeal.

Respectfully submitted,

/s/ Charles Hershfield
Charles Hershfield
Box 934
Dahlgren, VA 22448

CERTIFICATE:
I hereby certify that a copy of this Petition has been sent by first class mail postage prepaid to Jean Masten Kelly, County Attorney, Post Office Box 509, Bowling Green, VA 22427, on this day 24 Sep 99.

VIRGINIA:

In the Circuit Court of the County of King George

CHARLES HERSHFIELD, Petitioner

v.

BOARD OF ZONING APPEALS, Respondent

POST-TRIAL MOTIONS

[FILED FEB - 4 1999]

RECEIVED

FEB - 4 1999
JAMES W. HALEY, JR.
JUDGE
FIFTEENTH JUDICIAL
CIRCUIT

Charles Hershfield, pro se
Box 934
Dahlgren, VA 22448

VIRGINIA

IN THE CIRCUIT COURT OF THE
COUNTY OF KING GEORGE

CHARLES HERSHFIELD, pro se,
Appellant

v. In Chancery # 98-37

BOARD OF ZONING APPEALS
KING GEORGE COUNTY, VIRGINIA
Appellee

ORDER

THIS CAUSE came on January 14, 1999 as an appeal of the decision of the King George County Board of Zoning Appeals filed by Charles Hershfield, pro se, pursuant to section 15.1-2314 of the Code of Virginia, 1950, as amended.

UPON CONSIDERATION of the record presented to the Court and argument of the parties, the Court hereby finds that there is no evidence of a variance granted to the petitioner by the County; that proper notice was given by the Board of Zoning Appeals for the public hearing held on March 24, 1998; that the decision of the Board of Zoning Appeals was based on correct principles of law and was not plainly wrong or in violation of the purpose and intent of the King George County Zoning ordinance.

It is therefore ORDERED that the decision of the King George County Board of Zoning Appeals is hereby affirmed.

/s/ James W. Haley, Jr.
JUDGE

March 4, 1999
DATE